UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

AUDREY GOTT, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	*Civil No. 89-0266 P*
	)	
EDWARD F. SIMPSON, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS [1]

[1] A motion for judgment on the pleadings is only appropriate after the close of the pleadings. 5 C. Wright & A. Miller, *Federal Practice and Procedure* ' 1367 at 688 (1969). Because I have this date granted the plaintiffs' motion to amend the pleadings, the pleadings are not closed. I thus treat the motion strictly as a Fed. R. Civ. P. 12(b)(6) motion to dismiss.

In this action the plaintiffs, an informal group of investors collectively known as the GTM Group,[2] seek damages pursuant to state law and the Racketeer Influenced and Corrupt Organizations Act (``RICO''), 18 U.S.C. '' 1961-68, from defendants Simpson and Hughes.[3] The plaintiffs allege that through the use of the mails and wires and as part of a pattern of racketeering activity the defendants fraudulently and illegally induced the plaintiffs to invest in two real estate ventures. The defendants argue that this court should dismiss the RICO counts against them because the plaintiffs have failed to allege the essential elements of a RICO claim, and seek the dismissal as well of the remaining state law claims for lack of subject-matter jurisdiction.

Specifically, the defendants contend that the plaintiffs have failed to allege a pattern of racketeering as required to maintain a RICO claim. They argue that the facts pled are insufficient to support a claim under RICO because they allege only a single act of fraud implemented over a period of a few months through the use of a few telephone calls and meetings and do not establish a threat of future criminal activity. The plaintiffs allege that the facts stated in the amended complaint constitute only one example of a series of similar fraudulent real estate transactions engaged in by defendant Simpson. *See* Amended Complaint & 40.

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[2] *See* Exh. A to Amended Complaint at 1.

[3] Although the plaintiffs originally also named as a defendant the Bostonian Corporation, they have dropped that entity in their amended complaint. *See* Amended Complaint; Memorandum in Support of Plaintiffs' Motion to Amend Complaint at 1. Accordingly, I will address only those issues which affect the two remaining defendants.

On a motion to dismiss, the material factual allegations of the complaint must be taken as true, *Cooper v. Pate*, 378 U.S. 546 (1964), and interpreted in the light most favorable to the plaintiffs, *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 25 (1st Cir. 1987). The motion may be granted ``only if, when viewed in this manner, the pleading shows no set of facts which could entitle [the pleader] to relief." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988) (citing *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957)). Applying these guidelines, the material facts are as follows. The plaintiffs are an informal group of investors who became interested in purchasing resort property in Ogunquit, Maine in order to market time-shares therein. In March, 1989 plaintiff Bernard Twomey was approached by Phyllis Perkins who represented that she was the owner of two properties in Ogunquit suitable for time-sharing: a five-unit condominium building known as Cove Landing and a thirty-six-unit hotel with attached restaurant and lounge known as the Georges Grant Hotel. These properties were heavily mortgaged and were in danger of default or foreclosure. Defendant Hughes, Perkins' friend, claimed to have the contacts to obtain local zoning and other approvals needed to effect the time-share plans. Hughes introduced the plaintiffs to defendant Simpson as a person who had the contacts and expertise to overcome whatever resistance the mortgagee banks might have to transferring the properties. At least two meetings were held at which the parties discussed the acquisition and the progress of other aspects of the arrangement. The plaintiffs clearly stated at these meetings that their participation was based on the understanding that one of the properties, Cove Landing, was to be immediately available for time-share marketing. The defendants assured the plaintiffs that all the necessary approvals had been obtained or were in the process of being obtained for the time-sharing of Cove Landing and that attorneys were drafting the necessary papers. Based upon these representations the plaintiffs agreed to enter into a letter of intent with the defendants outlining the terms and conditions of the acquisition, sale and management of the properties. The letter of intent

provided, among other things, that title to the properties was to be taken in the name of separate realty trusts. On or about April 12, 1989 defendant Simpson transmitted via telefacsimile an execution copy of the letter of intent to plaintiff Audrey Gott in Montreal, Canada. At or about the same time Simpson sent Mrs. Gott copies of the purported purchase and sale agreements for both properties.

On or about April 28, 1989 the Gotts wired approximately $165,000 (U.S.) from Montreal to the account of the Bostonian Corporation in Massachusetts. A portion of this money was to be used to pay arrearages on the existing mortgage on Cove Landing so that it would be released for time-share sales. On or about May 15-16, 1989 the plaintiffs delivered $207,000 to the defendants for use in connection with the purchase of Georges Grant. On or about May 17, 1989 defendant Simpson acquired title to the Georges Grant property in the name of Snow's Island, Inc., a Maine corporation in which Simpson is believed to be sole shareholder. No shares in Snow's Island have ever been transferred to the plaintiffs or to an independent real estate trust or other entity in which the plaintiffs hold any legal or equitable interest. At a meeting held on or about May 21, 1989 among the parties the defendants told the plaintiffs that everything was going as planned and showed them the ``reservation agreement" that was to be used for taking time-share deposits at Cove Landing. Approximately three weeks after that meeting defendant Simpson telephoned plaintiff William McCauley in Canada to tell him, among other things, that Cove Landing would require an immediate $60,000 to get started. The plaintiffs delivered the money to the defendants in Boston on June 8, 1989. Simpson confirmed that things were on track and told McCauley that he would be providing the plaintiffs with financial statements. Two days later the plaintiffs provided an additional $15,000 to the defendants for the Cove Landing project. Hughes again assured McCauley that everything was going forward with the project and that he would have the lights and water turned on, but he provided no

financial statements. Subsequently, the defendants encouraged McCauley and Twomey to prepare marketing material for Cove Landing and falsely represented that physical improvements were already being made to the premises.

At a meeting held on June 19, 1989 in Franconia Notch, New Hampshire, defendant Simpson told the plaintiffs that the Cove Landing property would not be time-shared and disclosed for the first time that it had not even been purchased. He stated further that an additional $150,000 was required to purchase the property. He refused to account for the funds not yet spent and promised to provide financial statements by July 8, 1989 and to be in touch with McCauley. The plaintiffs have not been provided with any financial statements. None of the funds has been returned and no disclosure has been made as to the whereabouts of any remaining funds. There has been no further communication from the defendants except in connection with the pending litigation.

RICO states that a ```pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. ' 1961(5). In *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S.Ct. 2893 (1989), the Supreme Court specifically considered ``what conduct meets RICO's pattern requirement." *Id.* at 2897. The plaintiffs ``must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *Id.* at 2900 (emphasis in original). Thus, ``[a] party *may* establish continuity by demonstrating that the predicate acts amount to continued criminal activity." *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446 (1st Cir. 1990) (emphasis in original). The concept of continuity is fluid:

> ``Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. . . . A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks

> or months and threatening no future criminal conduct do not satisfy this requirement.

Northwestern Bell, 109 S. Ct. at 2902 (citations omitted); *see also Sion*, 893 F.2d at 446. However, the continuity requirement is also ``satisfied where it is shown that the predicates are a regular way of conducting [the] defendant[s'] ongoing legitimate business." *Northwestern Bell*, 109 S. Ct. at 2902. The plaintiffs do not contend, nor do the factual allegations support a conclusion, that the conduct complained of in this case ``by its nature projects into the future with a threat of repetition." *Northwestern Bell*, 109 S. Ct. at 2902. The issue this motion presents is whether the plaintiffs' allegations are sufficient to establish ``a series of related predicates extending over a substantial period of time." *Id.*

The facts alleged in the amended complaint establish that the predicate acts which make up the core of this action occurred over approximately a two and one-half month period, from March, 1989 to June 19, 1989. The Court's opinion in *Northwestern Bell* clearly states that predicate acts of short duration which do not project into the future the threat of repetition do not satisfy the continuity requirement. *Id.* Thus, the plaintiffs' amended complaint fails to state a claim under RICO unless it also alleges facts which indicate related predicate acts which ``amount to, or . . . otherwise constitute a threat of, *continuing* racketeering activity." *Id.* at 2901 (emphasis in original). Paragraph 40 of the amended complaint states in relevant part:

> On information and belief, Simpson has extensive commercial real estate holdings in the Commonwealth of Massachusetts, the state [sic] of Maine, and elsewhere. . . . Simpson has conducted such enterprise through a pattern of racketeering, *i.e.*, the instances of fraud averred in this complaint and, on information and belief, similar frauds perpetrated against others, in violation of 18 U.S.C. ' 1962(c).

Amended Complaint & 40. Read in the light most favorable to the plaintiffs, this paragraph establishes that core factual allegations contained in the plaintiffs' amended complaint do not describe an isolated

event of short duration, but rather indicate that this scheme is a part of multiple criminal schemes or is a regular way of conducting the defendants' ongoing legitimate business. Although proof of multiple criminal schemes is not required to establish continuity for purposes of a RICO action, ``proof that a RICO defendant has been involved in multiple criminal schemes [is] certainly highly relevant to the inquiry into the continuity of the defendant's racketeering activity." *Northwestern Bell*, 109 S. Ct. at 2901. Likewise, proof that the activities are part of the defendants' regular way of conducting an ongoing legitimate business satisfies the continuity requirement. Here the plaintiffs' allegation that this fraudulent scheme is part of an ongoing scheme or the regular business practices of the defendants adds the necessary predicates to establish a claim under RICO.[4]

[4] The Court of Appeals for the Third Circuit noted in *Swistock v. Jones*, 884 F.2d 755 (3rd Cir. 1989), that the Court's decision in *Northwestern Telephone* will enable most plaintiffs ``to withstand a facial attack on the complaint and have the opportunity to have their pattern allegations threshed out in discovery. It may be that many of these issues will then be susceptible to resolution via summary judgment." *Id.* at 758.

I conclude that the plaintiffs' allegations that defendant Simpson has engaged in similar fraudulent schemes with other real estate investors should be considered and that the complaint read as a whole sufficiently alleges a pattern of racketeering activity. Accordingly, I recommend that the defendants' motion to dismiss be ***DENIED***.[5]

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 29th day of June, 1990.

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David M. Cohen
United States Magistrate

[5] If my recommended decision concerning the RICO counts is accepted, the court has and should retain pendent-claim jurisdiction over the state law causes of action asserted in Counts III through VII of the complaint.